No. 77-217

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1977

Court of Appeals No. 76-2573

ROBERT P. BAGERIS, Petitioner

vs.

UNITED STATES OF AMERICA

REPLY BRIEF ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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COUNTER-STATEMENT OF JURISDICTION

Under its statement entitled "Jurisdiction", the Government has contended that the Petition for Writ of Certiorari was filed on August 4, 1977, and

was therefore out of time pursuant to Rule 22(2) of the Rules of this Honorable Court. As Assistant Clerk Ms. Jennie H. Lazowski can confirm, the Defendant's Petition for Writ of Certiorari was mailed from Detroit, Michigan in a package marked "Special Handling", and postmarked on July 28, 1977. When the package containing the Petition for Writ of Certiorari eventually arrived at the United States Supreme Court on August 4, 1977, it was marked as being damaged in transit and had to be rewrapped at the United States Post Office in Washington, D.C. It is respectfully submitted that since one arm of the United States Government, namely the United States Postal Service, damaged the package containing the Petition for Writ of Certiorari so that it ultimately arrived later

then its postmark of July 28, 1977 indicated, a different arm of the Government, namely the Solicitor General's Office, should not be permitted to claim untimeliness in the filing of the Petition for Writ of Certiorari. Moreover, the Solicitor General's Office has disregarded two express directives from this Honorable Court as to when its Reply Brief should have been filed, and it is respectfully submitted that it is ironical to now have the Solicitor General's Office contend that the Defendant's Petition was untimely filed in light of their own untimely conduct in filing their Reply Brief in this matter.

REPLY QUESTIONS PRESENTED

1. Is the Government correct in contending that the Petitioner, by failing to move

to suppress the personal history statements prior to trial, waived his objection to the use in evidence of the statements he made to the arresting officers during the booking procedures.

REPLY ARGUMENT

In its Reply Brief, the Government has contended that the Petitioner waived his right to contest the admisibility of the personal history statements by failing to file a pretrial motion to suppress said statements. Initially, it should be pointed out that the Sixth Circuit, in affirming the Petitioner's conviction, did not base its decision in whole or in part upon the alleged untimeliness of the Petitioner to file a pretrial motion to suppress.

Moreover, the cases cited by the Government for the proposition that the Petitioner should have filed a pretrial motion to suppress the statements obtained during the personal history questionnaire are not applicable to the issues involved since the cases cited by the Government primarily involve attacks upon search warrants and evidence seized resulting therefrom.

The Government has also failed to recognize the distinction between statements which are inculpatory on their face, and those which are exculpatory on their face such as the ones under attack in the present appeal, namely that the Petitioner did not use drugs of any kind whatsoever, including marijuana. Prior to December 1, 1975, the effective date of the current Rule 12(b)(3)

of the Federal Rules of Criminal Procedure, it was clear that under the prior Rule 12 which was in effect at the time of the Petitioner's trial, objections to statements which were not inculpatory or confessions on their face did not have to be made prior to trial. As stated in Moore's Federal Practice, Rule 12 of the Federal Rules of Criminal Procedure was substantially amended, effective December 1, 1975, to provide that motions to suppress evidence must be made prior to trial. Furthermore, Rule 12 was also amended to provide a mechanism so as to permit a defendant to learn in advance of trial of the Government's intention to use evidence which might be the target of a motion to suppress, but not readily apparent on its face, such as a statement which is exculpatory in nature on its face

but will be used by the Government in its case in chief at trial in an inculpatory fashion.

> "Rule 12 was substantially amended effective December 1, 1975. Subdivision (b) was amended to provide that motions could be made orally or in writing, at the discretion of the judge, and added the following remedies that must be sought prior to trial: motions to suppress evidence; . . . Among other amendments was the addition of a mechanism (see Rule 12(d)(1)) permitting a defendant to learn, in advance of trial, of the government's intention to use evidence which might be the target of a motion to suppress."
> 8, Moore's Federal Practice, pages 12-3 to 12-4.

> "Rule 12(b)(3), dealing with motions to suppress, makes it clear that any objections to evidence predicated on the ground that it was illegally acquired must be made before trial. This is in accord with the

present practice pertaining to illegal searches and illegally obtained confessions . . ."
8, Moore's Federal Practice, page 12-21.

"Subdivision (d) was added to Rule 12 in the 1975 amendments and is effective December 1, 1975. Rule 12(d) allows a defendant to ascertain the government's intention regarding the use of evidence which may be the object of a motion to suppress. The new subdivision complements the addition in Rule 12(b)(3) that motions to suppress evidence must be raised prior to trial . . ."
8, Moore's Federal Practice, pages 12-34 to 12-35.

As can be seen from the portions of Moore's Federal Practice quoted supra, Rule 12 that was in effect at the time of Petitioner's trial only required motions to suppress to be made prior to trial if the same pertained to illegal searches and illegally obtained confessions. Since the

statements of Petitioner in question were exculpatory on their face, and not confession-type statements, Petitioner had no duty to bring said motion prior to trial. Moreover, the defense had no mechanism similar to Rule 12(d) of the current Federal Rules of Criminal Procedure to permit the defense to know in advance of trial the precise type of evidence that the Government intended to introduce in its case in chief. Moore's Federal Practice explicitly states that Rule 12(d) was added so that the defense could be made aware of any evidence which should be subject to a motion to suppress prior to trial. Conversely, since there was no Rule 12(d) at the time of Petitioner's trial, there was likewise no duty on the part of Petitioner to look into a crystal ball and read the Government's mind in order to

determine what evidence the Government was intending to introduce in its case in chief.

In conclusion, Rule 12(b)(3) of the Federal Rules of Criminal Procedure, effective December 1, 1975, substantially altered the law that was in existence at the time of Petitioner's trial as it pertained to motions to suppress. Under the law existing at the time of Petitioner's trial, motions to suppress evidence only had to be brought prior to trial if the same pertained to illegal searches and seizures and to illegally obtained confessions. Since the statements in question from the personal history questionnaire were certainly exculpatory on their face, Petitioner had no duty to bring a motion to suppress prior to trial, and the Government has erroneously based its argument on the alleged

untimeliness of Petitioner's Motion as a basis for denying the Petition for Writ of Certiorari.

Respectfully submitted,

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